No. 1303

IN THE

Supreme Court of the United States

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Page
Counter Statement of Questions Presented	1
Counter-Statement of the Case	1
Reasons for Denying Writ of Certiorari	4
I. There Are No Substantial Issues Nor Questions Presented in This Cause Warranting Granting of Certiorari by This Court	4
II. The Procedure Followed by the District Court Did Not Deprive Petitioner of His Right to a Jury Trial	6
Conclusion	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

FOLEY LUMBER INDUSTRIES, INC.,

Petitioner,

v.

THE BUCKEYE CELLULOSE CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

COUNTERSTATEMENT OF QUESTION PRESENTED

In an effort to add substance to his contentions, Petitioner has presented three questions in his argument to this Court. These questions assume facts completely at variance with the record. There is only a single question here:

> Was the District Court correct in concluding that there was no genuine issue as to any material fact bearing upon the question of whether paragraphs 2 and 3 of the contract were mutually dependent and whether the contract had become inoperative?

COUNTERSTATEMENT OF THE CASE

The amended complaint filed herein by The Buckeye Cellulose Corporation, an Ohio corporation, hereinafter

called "Buckeye," against Foley Lumber Industries, Inc., a Florida corporation, hereinafter called "Foley," sought declaratory judgment that a certain agreement between the parties of date of May 4, 1953 was null and void, or, in the alternative, if such agreement was still in effect the amended complaint sought a declaration of the effect of said agreement.

The gist of the agreement of May 4, 1953 is contained in two provisions, to-wit: Paragraph 2, as amended (R. 13) wherein Foley had right of first refusal of any sawtimber stumpage offered for sale by Buckeye for a period of fifteen (15) years from May 4, 1953, and Paragraph 3, wherein Foley agreed to offer to Buckeye, upon usual and customary terms, all pulpwood obtained in its lumbering operations, wherever conducted, at the current market price. (R. 10)

The amended complaint alleged, *inter alia*, that Buckeye was engaged in the manufacture of cellulose products from pulpwood; that such manufacturing required Buckeye to maintain adequate supplies of pulpwood, all of which was known to Foley; that at the time the May 4, 1953 agreement was entered into Foley was actively engaged in a major logging and lumbering operation in northern Florida and was in process of constructing a sawmill, the successful operation of which would require Foley to buy and cut large quantities of timber on lands owned by Buckeye and others in the area, and the parties anticipated that in the course of its contemplated logging and lumbering operations Foley would acquire large quantities of pulpwood which Buckeye would be able to acquire for use in its manufacturing operations; that in the latter part of 1954 Foley terminated its logging and lumbering operations in the area and that at no time has Foley ever offered Buckeye any pulpwood. (R. 5-6)

Foley filed answer denying that the May 4, 1953 agreement was of no effect but in its answer admitted the material allegations of the complaint including specifically ". . . that at the time the May 4, 1953 agreement was entered into, it (Foley) was actively engaged in a major logging and lumbering operation . . ." and ". . . that at the time the May 4, 1953 agreement was entered into the defendant (Foley) was in the process of constructing a new mill at Shamrock, Florida . . ." and ". . . that the successful operation of its new mill at Shamrock, Florida, would require defendant to buy and cut large quantities of timber from lands owned by the plaintiff and others in the area . . ." and ". . . that it has not offered to sell plaintiff any pulpwood since May 4, 1953. . . ." (Parenthetical insertions ours.) (R. 14-18)

Foley incorporated a counterclaim in its answer on points not material to this appeal and demanded trial by jury.

Three pretrial conferences were held and both parties utilized the discovery procedures by depositions, interrogatories and requests for admissions. Immediately prior to trial after the jury was sworn, a conference of Court and counsel was held in chambers and in the course thereof motion for judgment on the pleadings was made by counsel for Buckeye, which motion was renewed in open Court and treated by the Court as motion for summary judgment. (R. 40-45)

Testimony was taken on the motion and at the conclusion thereof, the Court ruled in substance that Paragraphs 2 and 3 of the agreement of May 4, 1953 are mutually dependent, that is, the provision in Paragraph 2 giving right to Foley of first refusal of sawtimber stumpage offered for sale by Buckeye and the provision in Paragraph 3 that Foley would offer to Buckeye all pulpwood procured by it,

were mutually dependent provisions, and "in fact the very core of the agreement," and the admitted basic facts demonstrated conclusively that it was impossible for Foley to perform the agreement and the agreement was therefore of no force and effect. (R. 107-110)

On appeal the Court of Appeals affirmed the judgment of the District Court except the District Court's denial of Foley's motion for determination of date when the May 4, 1953 agreement became of no effect.

REASONS FOR DENYING WRIT OF CERTIORARI

I. There Are No Substantial Issues Nor Questions Presented in This Cause Warranting Granting of Certiorari By This Court.

The rules of this Court (Rule 19) provide that review by certiorari is not a matter of right but will be granted only where there are "special and important" reasons therefor. We will not attempt to enumerate the specific considerations that guide this Court in the exercise of its discretion in granting review by certiorari, but suffice it to say that petitioner has not shown that this case measures up to the requirements of the rules.

The sole determinative issue in this cause is the interpretation of a contract between the parties in the light of certain facts relevant thereto, and as we will hereinafter show, this issue is not even before this Court for review. The sole contention advanced by petitioner as grounds for review by this Court is that the summary judgment procedure followed by the District Court and approved by the Court of Appeals deprived petitioner of his right to a jury trial. However, in the Court of Appeals petitioner recognized the insignificance of this issue and candidly admitted on page 6 of its Reply Brief that "Foley is not here insisting so much that the facts material to the issue determined

by the District Judge are in dispute, as that the District Judge erred in ruling as he did on the evidence introduced."

In the Court of Appeals the basic contention of petitioner was that the District Court erred in holding that the provisions in Paragraphs 2 and 3 of the contract wherein Buckeye granted to Foley first refusal rights to sawtimber stumpage and Foley agreed to sell pulpwood to Buckeye were mutually dependent provisions, *yet such holding by the District Court and the affirmance thereof by the Court of Appeals is not assigned by petitioner as ground for review by this Court.* The significance of this omission is best demonstrated by reference to petitioner's reply brief in the Court of Appeals, page 7, wherein it is stated:

> "although Judge Carswell's (procedural) rulings do not entirely dispose of the case and it must be returned for retrial, his erroneous construction of the agreements must be corrected, *otherwise a retrial before Judge Carswell will necessarily result in a further appeal.*" (Emphasis ours)

Thus petitioner has admitted that the procedural issue presented to this Court is academic and not determinative of the cause and that it could not prevail upon retrial unless the interpretation of the contract by the District Court and the Court of Appeals was reversed. Since such interpretation is not before this Court for review, the interpretation adverse to petitioner has become finalized and the futility of the petitioner's position and the uselessness of review of this cause by this Court is clearly apparent.

In conclusion, we submit that petitioner has not shown any "special and important" reason for review; there is no federal question of substance involved herein; there is no conflict between the decision of the Court of Appeals and the decision of another Court of Appeals on the same matter; and there is no sufficient departure from the accepted and usual course of judicial proceedings as to call

for the exercise of this Court's power of supervision.

The only issue in this cause is one of interpretation of a contract between the parties. This is an issue of local law and it has been settled by the District Court and the Court of Appeals in the usual and accepted course of judicial proceedings and this interpretation has not been assigned as grounds for review.

II. The Procedure Followed By The District Court Did Not Deprive Petitioner of His Right to a Jury Trial.

It should be noted at the outset that, although one member of the Court of Appeals dissented from the majority opinion affirming the judgment of the District Court, the dissenter, as well as the majority, concluded that the summary judgment procedure followed by the District Court was appropriate in view of the lack of dispute as to any genuine issue of material fact.

The contention that the District Court invaded the province of the jury by inquiring into the issues of consideration and mutuality is dispelled by the very record references cited by petitioner in support of this. Pursuant to respondent's motion for judgment on the pleadings, the District Court conducted a hearing for the sole and limited purpose of determining whether any genuine issue of fact was present. (R. 49-50) Counsel were so advised and the Court specifically requested petitioner to point out the areas of factual dispute, if any existed. (R. 97-98); Petitioner failed to cite any issue of fact and instead stated:

> ". . . my position is, as a matter of law, that your Honor must rule that paragraph 3 of the the contract or agreement of May 4, 1953 does not impose upon Foley any obligation to engage in lumbering operations which will be productive of pulpwood to be offered by Foley to Buckeye. That is my position in a

nut-shell and I have a decision of the Court of Appeals, Fifth Circuit, I would like to cite to your honor." (R. 99-100)

A clearer statement that the issue was one of law rather than fact is difficult to imagine. The District Court thereupon concluded on the basis of the pleadings, depositions and testimony that the material facts were undisputed and that Paragraphs 2 and 3 of the contract were mutually dependent. Since petitioner was admittedly unable to carry out its part of the contract, the Court concluded as a matter of law that the contract was no longer in effect. (R. 108-110) The procedure followed by the District Court is specifically authorized by Rule 12(c) of the Federal Rules of Civil Procedure.

Petitioner's quarrel is with the legal conclusion reached by the District Court in interpreting the contract. Since a question of Florida contract law does not afford any basis for review by this Court, petitioner has engaged in pure semantics in an effort to convert this question into an issue of "the conclusions or inferences to be drawn from the facts." (Petitioner's brief at page 14.) No issue of factual inference was present before the District Court. The disputed inferences to which the District Court made reference (R. 98) resulted solely from application of different legal theories to the same set of facts. Petitioner recognized this in its argument to the District Court and to the Court of Appeals that its promise was merely "an output promise" which, as a matter of law, only bound Foley to offer Buckeye the pulpwood obtained in connection with its lumbering operations, and to forbear from selling to others. Petitioner's present contention that the issue is one of inferences or conclusions to be drawn from undisputed facts by the jury is baseless and should be recognized for what it

is—a poorly disguised artificial issue contrived solely to avoid this Court's policy of refraining from reviewing matters involving only interpretation of state substantive law.

Finally, petitioner makes the curious contention that it was prejudiced because the Court of Appeals affirmed the District Court on a different theory and foreclosed petitioner from offering evidence. The curious aspect of this contention arises from the fact that the only aspect in which the Court of Appeals differed with the District Court operated to petitioner's benefit.

It is clear from the oral opinion of the District Court and the opinion of the majority of the Court of Appeals that the basic conclusion was the same in both instances—that the promises of Paragraphs 2 and 3 of the contract were mutually dependent and that petitioner's inability to perform rendered the contract inoperative. However, the Court of Appeals found the record insufficient to show the time at which the contract became inoperative. Consequently, the judgment dismissing Foley's counterclaim for damages was reversed and remanded to the District Court for determination of this issue and also to determine whether there was a genuine issue of material fact as to whether Buckeye breached the contract before it became inoperative. On the basic issue of mutuality, the Court of Appeals reached the same conclusion as the District Court and upon the same theory. Petitioner had ample opportunity before the District Court and the Court of Appeals to point out any issues of fact bearing upon the determinative questions in this case. Petitioner failed to do so on these occasions and petitioner has failed to do so in his argument to this Court.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be denied for the reasons that:

1. The petition presents no substantial issues or important reasons warranting review by this Court.
2. The procedure followed by the District Court did not deprive petitioner of his right to a jury trial.

Respectfully submitted,

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